

STATE OF VERMONT  
ENVIRONMENTAL BOARD  
10 V.S.A., Chapter 151

**RE:** City of **Rutland** Findings of Fact, Conclusions  
Sewage Treatment Plant of Law, and Order  
Frank H. Zetelski, City Declaratory Ruling No. 146  
Attorney  
City Hall  
**Rutland**, Vermont 05701

On November 18, 1983 the City of **Rutland**, through its attorney Frank H. Zetelski, petitioned the Environmental Board ("the Board") for a declaratory ruling requesting the Board to find that 10 V.S.A., Chapter 151 (Act 250) does not apply to a proposed expansion of the **Rutland** City sewage treatment plant.

Chairman Margaret P. Garland held a prehearing conference on this request on December 19, 1983 in **Rutland**, Vermont. The Board convened a hearing on this petition on January 11, 1984 at the Vermont District Court, **Rutland**, Vermont.

The only party present at this hearing was the City of **Rutland**, by Frank H. Zetelski, City Attorney.

The Board recessed the hearing on January 11, 1984 pending a review of the record and deliberation. On January 25, 1984 the Board determined the record complete and adjourned the hearing. This matter is now ready for decision.

The Board's Findings of Fact and Conclusions of Law are based on the record developed at the hearing and materials submitted by the City. To the extent that the petitioner's requests to find were accepted by the Board, they have been included herein. Otherwise, said requests are found to be unnecessary and are denied.

A. Issues in the Declaratory Ruling

On March 1, 1982 District Coordinator Robert Brown issued a Project Review Sheet which concluded that no Act 250 permit was required for a proposed upgrade of the **Rutland** sewage treatment plant. On September 1, 1983 District Coordinator Sally Greene issued Advisory Opinion 1-039 concluding that lands involved in three related projects should be included in determining jurisdiction over the sewer plant project. The three related projects are:

- 1) the "Alpine Pipeline" proposed to run from Sherburne Pass to the City plant;
- 2) the **Rutland** Industrial Development Commission ("**RIDC**") industrial park force main from North Clarendon to the City plant; and

2/8/84  
Docket # 146

- 3) a conversion of the **Rutland** Town Fire District #1 plant located in Center **Rutland**.

Because total involved land, including these projects, exceeded 10 acres, Ms. Greene concluded that the City plant expansion required an Act 250 permit.

On September 26, 1983 the City appealed Ms. Greene's advisory opinion to the Board's Executive Officer pursuant to Board Rule 3. On October 18, 1983 the Executive Officer, W. Gilbert Livingston, issued advisory opinion EB-83-26 essentially affirming the Coordinator's opinion that an Act 250 permit is required.

It is the City's basic contention in this case that the earlier Advisory Opinions by Ms. Greene and Mr. Livingston are incorrect and this project is not subject to the jurisdiction of 10 V.S.A. (Chapter 151) because the project has not changed since March 1, 1982, new construction for this project does not involve 10 acres of land, and the three other sewer line projects are not part of or related to this sewage treatment plant expansion project.

At the outset of the hearing, the City moved to dismiss Advisory Opinion #1-039 issued by Sally Greene on September 1, 1983 on the grounds that this opinion was unsolicited and was not initiated by a request by any party, nor was it based upon any new information about the sewage treatment plant. The City contended that dismissal of the Advisory Opinion would render this' Declaratory Ruling request moot. After deliberative session, the Board denied this motion by the City and proceeded with the hearing.

B. Findings of Fact

1. The City of **Rutland** has recognized the need to improve the levels of sewage treatment ever since the existing primary sewage treatment plant was constructed in 1962. Detailed study of the sewage treatment system has been underway since 1972. Although a facilities plan had been proposed for an upgraded plant by 1977, a portion of the Otter Creek into which the City was discharging was declared a "water quality limited segment" by the State of Vermont in 1977 because of effluent assimilation problems. Consequently, the City's plans were held up while the Otter Creek was studied. Final reports were issued in January and May 1979 by the Department of Water Resources.
2. Because the discharges from the City's plant have not been in conformance with the Clean Waters Act, the plant has been allowed to continue to discharge primary treated effluent under a Temporary Pollution Permit issued in 1979. This permit included a schedule to bring the plant into compliance with federal and state law.

3. In 1981 the Department of Water Resources issued a wasteload allocation plan which determined effluent limits for discharges by the four municipalities currently or potentially discharging into this section of the Otter Creek. The municipalities of **Rutland City, Rutland Town, West Rutland and Mendon** were allocated 1092 lbs/day, 138 lbs/day, 177 lbs/day, and 42 lbs/day of Ultimate Oxygen Demand (UOD), respectively.
4. At the time of the issuance of the wasteload allocation plan, it was determined by the Department of Water Resources that the most cost-effective method of providing future sewage treatment capacity would be through an upgrade of the City's plant into a regional facility.
5. In February of 1982, the City Aldermen approved the City's share of the cost of the final design of the treatment facility. The City's share was approved by the voters at the March 1982 City Meeting.
6. On March 1, 1982, Robert Brown, District Coordinator, issued a Project Review Sheet which indicated that an Act 250 permit was not required for the proposed upgrade of the plant into a regional facility because less than 10 acres of land were involved. The Facts relied on by Mr. Brown were that the project involved the upgrade of the plant on almost four acres of land, the construction of improvements to the pumping station, including the addition of grit chambers, all on less than one acre, the replacement of 7400 feet of sewer lines, and the chemical sealing of 10,000 feet of sewer lines. Total involved land was estimated to be approximately 8.3 acres at that time, including 3.3 acres of replacement sewer line construction. At the Board's hearing, a more exact determination of the land involved indicated that 5.5 acres were involved at the plant site and approximately one-half acre was involved at the pumping station, bringing total involved land with the sewer line acreage to 9.3 acres.
7. As of March 1, 1982, the City had no concrete plans to connect the sewer systems or lines of any other municipality to the upgraded plant.
8. The project as finally designed will have the capacity to accommodate the projected flows from **Rutland Town and Mendon**. The design capacity of the new plant is 6.8 million g.p.d., while the capacity of the existing primary plant is 6.6 million g.p.d. Approximately 400,000 gallons per day of reserve capacity will be restored to the plant by reducing infiltration in the sewer lines. This will be **accomplished** by replacement and repair of the sewer lines as a part of this project. The overall purpose of the **project** is primarily for pollution abatement, rather than for capacity enhancement.

**Findings of Fact, Conclusions of  
Law, and Order  
Declaratory Ruling No. 146  
Page-- 4**

9. Federal and State funding of the sewage treatment plant is not dependent on the connection of sewers from **Rutland** Town and **Mendon** because of the relatively small amount of sewage to be contributed to the plant from these towns based on the wasteload allocation. Although an inter-municipal agreement has been signed with the Town of **Rutland** for the eventual connection of some as yet unspecified new sewer lines in the Town to this plant, the consummation of such an agreement has not been required as a condition of the funding of this plant. The City of **Rutland** will receive the funding for this project whether or not any other municipal system is ever connected to it.
10. The only definite plan for connection of a sewer line to the plant which is not owned by the City is the proposed force main from the RIDC industrial park at the airport in Clarendon. The City has agreed to accept the effluent from this industrial park and assign it to its own reserve capacity since it currently has a financial interest in the park (Exhibit #1). This sewer line will be a force main and will provide service only to the industrial park. Both the possible **Rutland** Town and Alpine Pipeline (**Mendon**) connections to the City's treatment plant are in the preliminary design stages only and no specific plans have been completed for any of these potential connections.
11. An engineer with the Department of Water Resources, advised the City that he believed the advisory opinions of Ms. Greene and Mr. Livingston to be incorrect and recommended that the City appeal to this Board instead of filing an application with the District Commission for approval of the plant expansion.

**C. CONCLUSIONS OF LAW**

1. Based upon the evidence presented at the hearing, the Board concludes that the proposed improvements to the City's treatment plant and collection system do not involve 10 acres of land. 10 V.S.A. §6001(3) defines development in part as:

[T]he construction of improvements on a tract of land involving more than 10 acres which is to be used for municipal or state purposes. In computing the amount of land involved, land shall be included which is incident to the use such as lawns, parking areas, roadways, leaching fields and accessory buildings.

As indicated in the findings above, all of the land involved with the actual improvements for this project do not exceed 10 acres. The 10,000 feet of sewer lines that will be

improved by internal chemical sealing were not deemed to be involved because no construction is required for these improvements.

2. The Board also concludes that the two possible municipal interconnections to the plant and the RIDC force main connection cannot be included as part of this project. Although Environmental Board Rule 2(A)(4) indicates that "development" also includes municipal projects completed in stages as part of a **plan or** larger undertaking which exceeds 10 acres in total, in this **case** there was insufficient evidence for the Board to conclude that either the **Rutland** Town or Alpine Pipeline connections should be considered a part of this project. The plans for both are too indefinite at this stage for either project to be included. Also, because the funding of the improvements to the City's plant is not contingent upon the execution of an agreement with any other municipality, it is clear that the City's project stands alone and is not part of a larger undertaking at this time. The RIDC force main connection cannot be considered to be a part of this project because it is only a single connection for an industrial project that should be considered the same as any other industrial connection. It is therefore not reasonable to conclude that the RIDC project is a part of the City's plan to improve its sewage treatment plant. **Consequently**, because none of the three projects can be included, the Board is unable to find that more than 10 acres are involved. Each of these other municipal projects must, however, be reviewed on its own merits by the District Coordinator to determine Act 250 jurisdiction when specific plans have been finalized.

3. As indicated in all of the above, the Board agrees with the City that this project has not been sufficiently changed since the District Coordinator's original jurisdictional ruling was made in March 1982 for a finding that an Act 250 permit is required. The Board wishes to emphasize, however, that in those cases where extended periods of time have elapsed between the initial jurisdictional ruling and the commencement of construction it is appropriate for jurisdictional rulings to be reviewed from time to time to determine whether the underlying **facts** of the case have been sufficiently changed **so** that a **permit** would now be required. It would also be appropriate to reassess a prior jurisdictional ruling if new or different facts **become** available about a project which would **cast** doubt on the original determination.

4. **We** caution the City that reliance on advice from a **Water** Resources engineer on matters of Act 250 jurisdiction is ill founded. Water Resources personnel have neither the **authority** nor the experience to assess matters of jurisdiction as difficult as those presented by this case.

D. ORDER

The City of Rutland need not obtain a land use permit pursuant to 10 V.S.A. §6081 for the proposed improvements to the sewage treatment plant, pumping station, and sewer lines.

Dated this 8th day of February, 1984.

FOR THE ENVIRONMENTAL BOARD

Dissenting:

Margaret F. Garland  
Margaret F. Garland, Chairman

Donald B. Sargent  
Donald B. Sargent

Lawrence H. Bruce, Jr.  
Lawrence H. Bruce, Jr.

Ferdinand Bongartz  
Ferdinand Bongartz

Melvin H. Carter  
Melvin H. Carter

Warren M. Cone  
Warren M. Cone

Priscilla N. Smith  
Priscilla N. Smith